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CHARLES ELMORE CROPLEY
CLERK

No 8 43

IN THE
Supreme Court of the United States
October Term, 1939

UNITED STATES OF AMERICA,

Plaintiff,

against

WILLIAM L. HUTCHESON, GEORGE CASPER
OTTENS, JOHN A. CALLAHAN and JOSEPH
AUGUST KLEIN,

Defendants-Appellees.

MOTION TO DISMISS APPEAL
and
STATEMENT AGAINST JURISDICTION

✓ JOSEPH O. CARSON, II,
THOMAS E. KERWIN,
MUNRO ROBERTS,
✓ JOSEPH O. CARSON,
BRYAN PURTEET,
✓ CHARLES H. TUTTLE,
Counsel for Defendants-Appellees.

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UNITED STATES OF AMERICA,

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WILLIAM L. HUTCHESON, GEORGE CASPER
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MOTION TO DISMISS APPEAL

FILED APRIL 15, 1940

Now come William L. Hutcheson, George Casper Ottens, John A. Callahan and Joseph August Klein, the defendants-appellees herein, by their attorneys, and move this Court to dismiss, with costs, the appeal taken herein to this Court by the United States of America upon the following grounds:

1. The statute relied on by the United States of America to sustain the appellate jurisdiction of this Court, *i. e.*, Title 18, U. S. C. § 682, Act of March 2, 1907, c. 2564, 34 Stat., 1246, as amended, otherwise known

as the Criminal Appeals Act, is not applicable to this cause.

2. This Court has no jurisdiction under any statute of the United States to hear and determine said appeal.

Dated: April 13, 1940.

JOSEPH O. CARSON, II,
THOMAS E. KERWIN,
MUNRO ROBERTS,
JOSEPH O. CARSON,
BRYAN PURTEET,
CHARLES H. TUTTLE,
Counsel for Defendants-Appellees.

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UNITED STATES OF AMERICA,

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WILLIAM L. HUTCHESON, GEORGE CASPER
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STATEMENT AGAINST JURISDICTION

In compliance with Rule 12, Paragraph 3 of the Supreme Court of the United States, as amended, defendants William L. Hutcheson, George Casper Ottens, John A. Callahan and Joseph August Klein, by their attorneys, file this statement of matters or grounds making against the jurisdiction of the Supreme Court of the United States to review upon direct appeal from the Federal District Court the judgment entered in this cause:

The United States seeks to appeal direct to this Court from a judgment of the Federal District Court sustaining the separate demurrers of these defendants to the indictment filed herein. As ground for direct appellate jurisdiction in this Court, it asserts that the said judgment is

based upon the construction of Section 1, of the Sherman Anti-Trust Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. Sec. 1) within the meaning of the Criminal Appeals Act (Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. Sec. 682). As a further ground, it suggests that the sustaining of the separate demurrers of the defendants herein amounts to the sustaining of a "special plea in bar, when the defendant has not been put in jeopardy" within the meaning of the said Criminal Appeals Act.

For the clear and well established reasons set forth below, defendants assert that the judgment by the Federal District Court is not, as contended by the United States, predicated on the grounds necessary to bring it within the provisions of the Criminal Appeals Act. Accordingly, we respectfully submit that this Court has not jurisdiction of a direct appeal in this cause.

I. The judgment of the District Court was not "based" upon a construction of the Sherman Act.

The mere fact that the District Court sustains a demurrer on the ground that the allegations of the indictment are insufficient to charge a crime under a Federal statute is not in itself any basis for a direct appeal to this Court.

All Federal crimes are statutory; but every determination that a given set of facts set forth in an indictment does not constitute a crime does not create a judgment "based upon the construction of the statute."

The meaning of the statute may have become so well settled by judicial decision, or may be so clear from the language used, or may be so absent from the issues debated that the judgment of the Court is not based upon the construction of the statute but is based solely upon

the construction of the indictment. In other words, the judicial process by which is reached the determination that the indictment is insufficient in point of fact may not involve any consideration or adjudication concerning the choice of constructions to be put upon the Act, but only a consideration and an adjudication of the sufficiency of the acts alleged to constitute the crime charged. To illustrate, a determination that an indictment which did not mention interstate commerce did not state a crime under the Sherman Act would clearly not involve the judicial process with problems of construction of the Sherman Act.

Such is this case. The District Court has not attempted to make a choice between different constructions of the Sherman Act proposed by the respective parties. The District Court merely takes the Sherman Act as it stands and the principles which have become axiomatic through repeated decisions of this Court.

All that the District Court has really done is to say that in the light of these axiomatic and settled principles the pleading is bad as a pleading, to wit, it fails to set out a crime. To quote the opinion of Judge DAVIS:

"In order to charge the defendants with the commission of a crime under the Sherman Act, the indictment must not only allege sufficient facts to show a conspiracy to cause a direct restraint upon interstate commerce, as distinguished from a remote or incidental restraint (*Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 37, 79 L. Ed. 1570; *Levering & Garrigues Company v. Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062), but must also show that defendants' activities were unlawful, outside the scope of the legitimate objects and means that may be sought and employed by labor unions under the sanction of the Clayton Act (*Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. Ed. 349)."

No choice of constructions of the Sherman Act is involved in these statements. The statements themselves are elementary and axiomatic, thoroughly established by repeated decisions of this Court. In other words, Judge DAVIS was not construing the Act, but merely predicating himself on certain principles which this Court has definitely settled. Against these axiomatic principles Judge DAVIS has measured the factual statement in the indictment and has found it clearly wanting. In other words, it was not the statute which was weighed but the facts; and the Court's conclusion was thus stated:

"This is alleged to be a criminal case. The indictment should set forth facts which if proved would constitute a crime. *That this indictment does not do.*" (Italics ours.)

We submit that there could be no clearer statement that the Court was merely construing the indictment and not the statute. To say, as does Judge DAVIS, that the "allegations in the indictment * * * fail to allege" a direct restraint of interstate commerce and show a restraint which "is only incidental", is not placing a construction on the Sherman Act but only pointing out wherein the facts alleged fall short of the settled standards of criminality. So likewise, to say, as does Judge DAVIS, that the facts alleged show that the purpose of the defendants "was not to restrain commerce, but to prevail in a local labor controversy", is to base the decision upon the allegations and not upon the construction of the Act. Indeed, that statement does not even involve a construction of the allegations, but merely recognition that they not merely omit but actually negative facts essential to criminality.

II. Moreover, jurisdiction cannot in any event be made out because the judgment is predicated on an independent non-appealable ground.

The United States, on the authority of *U. S. v. Borden Company, et al.*, 308 U. S. , 60 S. Ct. 182, contends that what it asserts to be construction by Judge DAVIS of the Clayton Act (15 U. S. C. Sec. 17) and the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. Sec. 101-115) necessarily constitutes construction of Section 1 of the Sherman Act. The defendants cannot agree that Judge DAVIS has construed the latter acts. But assuming for the purposes of this statement that he has, this Court will not take jurisdiction of this appeal if the judgment below was predicated also on an independent, non-appealable ground, i. e., the construction of the indictment.

United States v. Hastings, 296 U. S. 188;

United States v. Borden Company, et al., 308 U. S. , 60 S. Ct. 182.

This Court summarizes this principle in the *Hastings* case as follows:

"A distinct question is presented where the District Court has not placed its decision solely upon the invalidity or construction of the statute, but also has sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency. In such a case the judgment of the District Court would remain in effect, and the defendant would go free of the indictment, whatever views we might express upon appeal as to the construction or validity of the statute. We could not reverse the judgment upon questions not before us. An indictment not merely attacked, but found to be invalid on grounds not open here, would be made the vehicle of

an effort to obtain from this Court an expression of an abstract opinion, which might or might not fit a subsequent prosecution of the same defendant or others but would not determine the instant case. Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly."

And this principle is expressly recognized in the *Borden* case.

The independent, non-appealable ground upon which Judge DAVIS sustained the separate demurrers of these defendants is the failure of the indictment to allege sufficient facts to satisfy the statutory requirements heretofore established by this Court and universally accepted as the *sine qua non* of valid criminal pleading under the Sherman Act. Where such failure occurs, this Court is without jurisdiction.

United States v. Pacific & Arctic Co., 228 U. S. 87;

United States v. New South Farm & Home Co.,
241 U. S. 64;

United States v. Oppenheimer, 242 U. S. 85, 86.

And where the District Court opinion is predicated as much upon the construction of the indictment as upon the construction of the statute, this Court is without jurisdiction.

United States v. Carter, 231 U. S. 492;

United States v. Moist, 231 U. S. 701.

Thus it has become quite customary, in view of the duty upon the United States affirmatively to show that construction of the statute is involved, for the District Court

judge to certify whether or not his decision was predicated on the construction of the statute.

United States v. Chavez, 228 U. S. 525;

United States v. Flores, 289 U. S. 137;

United States v. Hastings, 296 U. S. 188;

United States v. Halsey, Stuart & Co., 296 U. S. 451.

In the present case, the United States has obtained no such certification.

Against the backdrop of these authorities, Judge DAVIS' opinion in the present cause should be viewed. He has given no new meaning to Section 1 of the Sherman Act. He has employed the meaning which prior judicial construction has made definite and certain. Clearly a direct restraint on interstate commerce must be alleged. But, as Judge DAVIS points out (p. 4), only an incidental restraint has actually been alleged:

"Allegations in the indictment concerning the activities of defendants in picketing the premises of Anheuser-Busch, Inc. and Gaylord Container Corporation, as well as the refusal to allow their members to be employed by Borsari Tank Corporation and L. O. Stocker Company, fail to allege a conspiracy to directly restrain interstate commerce; the restraint on commerce shown by such allegations is only incidental. *Levering & Garrigues Company v. Morrin*, *supra*; *United Leather Workers v. Herkert & Meisel*, 265 U. S. 457; *Industrial Association v. United States*, 268 U. S. 64; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *Leader v. Apex Hosiery Company* (C. C. A., 3rd, 1939), 108 Fed. (2d) 71.

"The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy. The Congress has not declared that a dispute of the nature alleged is unlawful. By the indictment it is sought to punish

the defendants for what is conceived to be an unwarranted interference with a local industry, under the pretense that by the dispute interstate commerce was restrained."

His conclusion therefrom is inevitable, that, wholly apart from construction of the Clayton and Norris-La Guardia Acts, the indictment is deficient as a pleading. It lacks the essential criminal allegations of intent directly and unreasonably to restrain interstate commerce. No matter what construction of the Sherman Act may be taken, the allegations in the indictment herein, in the view of Judge DAVIS, do not amount to the facts necessary to charge a crime under that act. 'As the court in *United States v. Denison*, 47 F. (2d) 433 says so clearly at page 436:

"This right to proceed by error to the Supreme Court, however, only lies where the validity or construction of the statute is involved. No such question here arises, since we are dealing solely with the sufficiency of the indictment to charge a crime under the statute. Besides, the validity and construction of this statute has been so often upheld by the courts as to wholly deprive a defendant of the right to proceed on either of the grounds provided. Where the construction of a statute and its validity have been adjudicated, the right to proceed by writ of error from a District Court to the Supreme Court on either of these grounds will no longer be recognized."

III. Jurisdiction cannot be made out on the ground that the judgment of the District Court sustained a plea in bar within the meaning of the Criminal Appeals Act.

The United States suggests that the jurisdiction of this Court "may be sustained on the ground that the judgment of the District Court is one sustaining a special

plea in bar, when the defendants have not been put in jeopardy." In support thereof it cites five decisions of this Court, in none of which a *demurrer* was involved and in three of which it was merely decided that a plea of the Statute of Limitations is a plea in bar.

This contention ignores the fundamental difference between a plea in bar and a demurrer. The former presents an issue of fact. A demurrer always presents an issue of law.

As the Court said in *United States v. Storrs*, 272 U. S. 652:

"The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense."

In neither a technical nor a liberal sense has a demurrer questioning the sufficiency in law of the facts charged ever been held to be a "special plea in bar" within the meaning of the Criminal Appeals Act.

But the United States' attempted characterization of the demurrers in this cause as pleas in bar becomes groundless upon a reading of the very statute under which it hopes to bring the judgment of the court below. The Criminal Appeals Act specifically provides in its second paragraph that direct appeal from a sustained *demurrer* lies only "where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." On the other hand that Act provides that direct appeal from a "special plea in bar, when the defendant has not been put in jeopardy" lies in all cases. If, as the United States suggests, a demurrer is a special plea in bar it would be unnecessary for this Court to consider whether the invalidity or construction of the statute grounds the District Court's judgment.

Appeal would lie in all cases,—and the provision in the Criminal Appeals Act with regard to demurrers would be emasculated.

It cannot presently be assumed that this Court has for thirty-three years mistakenly construed the Criminal Appeals Act to mean what it says. On no such tenuous grounds can the jurisdiction of the United States Supreme Court be rested.

Respectfully submitted,

JOSEPH O. CARSON, II,

THOMAS E. KERWIN,

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